HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RANDALL CASHATT, BRANDON KENDALL,DAVID HODEL, CHAD PRENTICE, BETHJOSWICK, and JEFFREY HEATH, individually and on behalf of all others similarly situated,, Plaintiff, v. FORD MOTOR COMPANY, Defendant.	CASE NO. 3:19-cv-05886-RBL ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION TO STRIKE CLASS ALLEGATIONS DKT. ## 22, 23

INTRODUCTION

THIS MATTER is before the Court on Defendant Ford Motor Company's Motion to Strike Class Allegation [Dkt. # 22] and Motion to Dismiss for Failure to State a Claim [Dkt. # 23]. Plaintiffs are law enforcement officers who were issued 2011-2018 model year Ford Explorers. Plaintiffs allege that these vehicles have a design flaw that causes carbon monoxide to leak into the passenger compartment, which injured Plaintiffs in various ways. Ford now argues that Plaintiffs' claim for fraudulent concealment is preempted by the Washington Products Liability Act (WPLA) and that Plaintiffs' WPLA claim is conclusory. Ford further seeks to

short-circuit this products liability class action because of the individualized issues it raises. The Court agrees with Ford and GRANTS its Motions.

BACKGROUND

Plaintiffs allege that Ford's 2011-2018 Explorers were designed and manufactured with a flaw that "cause[s] the presence of exhaust fumes, including carbon monoxide, in the passenger compartment while the vehicles are in use." FAC, Dkt. # 21, at 8. Carbon monoxide poisoning can cause such symptoms as "headaches, dizziness, weakness, upset stomach, vomiting, chest pain, and confusion." *Id*. at 9-10. Plaintiffs allege that Ford has known about the exhaust fume defect in its Explorers since 2012 but concealed that information from Plaintiffs and other officers and continued to sell its vehicles to police departments. *Id*. at 11-12.

Plaintiffs incorporate several consumer complaints to the National Highway Transportation Safety Administration (NHTSA). FAC at 13-18. These complaints describe fumes entering the vehicles cabin, resulting in symptoms ranging from a strong smell to tiredness, headaches, nausea, vomiting, dizziness, lightheadedness, and passing out. *Id*. NHTSA has apparently received 2,700 such complaints, with some resulting in crashes. *Id*. at 19. With respect to the Ford Explorer Police Interceptor issued to officers, the NHTSA has reported that these vehicles "may be 'experiencing exhaust manifold cracks, which appear to present a low level of detectability, and may explain the exhaust odor.'" *Id*. at 20.

Ford has also received 2,400 reports from customers. FAC at 19. Ford has responded by issuing several Technical Service Bulletins (TSB) to dealerships with procedures for addressing the exhaust issues, though Plaintiffs allege that Ford's efforts have been unsuccessful. *Id*. at 19, 20, 22. One stated that "[s]ome 2011-2015 Explorer vehicles may exhibit an exhaust odor in the

vehicle with the auxiliary climate control system on." *Id*. at 20. Ford also announced that drivers of non-police explorers should not be concerned. *Id*. at 21.

The FAC is light on specific allegations about Plaintiffs' use of Ford Explorers. However, Plaintiffs do claim that they "became sick, disorganized, foggy headed, suffered medical illnesses; heart attack like symptoms, chronic carbon monoxide poisoning, acute carbon monoxide poisoning, fatigue, nausea and other disabling injury" as a result of the exhaust fume defect. FAC at 34. Plaintiffs also claim that they materially relied on Ford's misrepresentations and would not have operated the vehicles had they known of the defect. *Id*. at 5-6. Plaintiffs assert claims for fraudulent concealment and violation of the WPLA. *Id*. at 30-34.[1] *Id*. at 30-34. Plaintiffs ask for injunctive and declaratory relief against Ford's fraudulent business practices, as well as punitive damages and an award of "costs, medical and related expenses and economic damages under applicable law, and compensatory damages for economic loss, and out-of-pocket costs in an amount to be determined at trial . . . [and] applicable statutory and civil penalties." *Id*. at 35.

In addition to asserting individual claims, Plaintiffs want to represent a class of "[a]ll law enforcement officers in the State of Washington who drove a class vehicle," i.e., a 2011-2018 Ford Explorer. FAC at 25. Plaintiffs assert that there are common issues related to the class, including whether the vehicles have a design defect, whether the defect presents a safety hazard, and "[w]hether Defendant violated the Washington State Products Liability Statute." *Id*. at 27-28.

[1] Plaintiffs confusingly style their claim as falling under the Washington Consumer Protection Act, which is codified at RCW 19.86, but then describe it as a products liability action and reference RCW 7.72.020.

DISCUSSION

1. Motion to Dismiss

a. Legal Standard

Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Although the court must accept as true the Complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *Vazquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnotes omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 556 U.S. at 678 (citing *id.*). On a 12(b)(6) motion, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).

b. Fraudulent Omission Claim

Ford first argues that Plaintiffs' common law fraud claim is preempted by the WPLA, RCW 7.72 *et seq*. Alternatively, Ford contends that Plaintiffs' fraud claim should be dismissed because none of the plaintiff officers entered into a transaction with Ford, which means Ford owed them no affirmative duty. In response, Plaintiffs argue that the WPLA does not preempt fraud claims and assert that the FAC properly alleges all nine elements of fraud.

"The WPLA would accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure." *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wash. 2d 847, 855 (1989). In its definition of a "products liability claim," the WPLA includes:

> any claim or action previously based on . . . breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act.

RCW 7.72.010. Washington courts have recognized that the WPLA supplants common law claims based on concealment related to a product. *See, e.g., Potter v. Wilbur-Ellis Co.*, 62 Wash. App. 318, 325 (1991) (explaining that plaintiffs' WPLA claim will succeed if they "can show the failure to inform them of the lawn damage Green Baron experienced when applying the chemical was intentional concealment of information about the product"); *Fagg v. Bartells Asbestos Settlement Tr.*, 184 Wash. App. 804, 812, 339 P.3d 207, 211 (2014).

Although Plaintiffs try to latch onto the WPLA's mention of fraud claims as exempt from preemption, Ford is correct that their claim is ultimately based on concealment of a product defect. Plaintiffs allege (ad nauseum) that Ford knew about the defect with its vehicles but omitted/concealed that information from Plaintiffs and others, leading them to suffer damages. This is, in essence, a products liability claim for which the WPLA is the exclusive remedy.

There is a further problem with Plaintiffs' fraud claim, which is that none of the plaintiff officers actually entered into a transaction with Ford to operate its vehicles; instead, they were issued the vehicles by their departments. Consequently, their damages could not have arisen purely out of Ford's alleged fraud, as would be the case if Ford had sold them defective vehicles that are worth less than had been represented. Plaintiffs' injuries are inherently connected to Ford's products themselves because they arose from merely operating the vehicles, not buying them. FAC, Dkt. # 21, at 32-33. Plaintiffs' assertions that their fraud claim is "different" from their products liability claim thus rings hollow. The fraudulent omission claim is preempted by the WPLA and dismissed

c. WPLA Claim

Ford next argues that Plaintiffs' WPLA claim is conclusory and thus fails to meet the pleading standard of Rule 12(b)(6). Ford points out that none of the Plaintiffs plead how or when they were exposed to exhaust fumes or what model year vehicle they drove, which is relevant to the statute of limitations for a WPLA claim. In opposition, Plaintiffs do little more than repeat the FAC's allegations.

Ford is correct. Plaintiffs' allegations are entirely conclusory and consist mostly of publicly-available information cribbed from other sources, such as the NHTSA and Ford itself. There is almost no detail regarding the plaintiff officers' experiences with Ford's vehicles or the types of injuries they suffered. To state a plausible personal injury claim, a plaintiff must at least identify how they were injured and what their injury was; a formulaic recitation of an array of health problems will not do. Ford's objections to the FAC are well-founded, and Plaintiffs' WPLA claim is also dismissed.

d. Plaintiffs' Requested Relief

Ford also challenges the types of relief Plaintiffs request. First, Ford points out that the WPLA does not allow recovery of purely economic or punitive damages. Second, Ford asserts that Plaintiff cannot obtain a judicial recall because vehicle recalls are the exclusive province of NHTSA and, alternatively, because the NHTSA has primary jurisdiction over recalls.

Because the Court has already determined that Plaintiffs' fraud claim is not legally viable and their WPLA claim is conclusory, addressing Plaintiffs' requested relief is not strictly necessary. However, in case Plaintiffs amend their WPLA claim, the Court agrees with Ford that the WPLA does not allow economic or punitive damages. RCW 7.72.010(e)(6) ("'Harm' . . . does not include direct or consequential economic loss under Title 62A RCW."). "The WPLA explicitly confines recovery to physical harm suffered by persons and property and leaves purely economic loss to the UCC." *Hofstee v. Dow*, 109 Wash. App. 537, 543 (2001). Plaintiffs describe their loss as "economic," but to the extent they seek compensation unrelated to personal injury such damages are prohibited.[2] Plaintiffs' request for punitive damages is likewise misguided. *See Baughn v. Johnson & Johnson*, C15-5283 BHS, 2015 WL 4759151, at *2 (W.D. Wash. Aug. 12, 2015) ("The WPLA does not authorize recovery of punitive damages.").

Plaintiffs' request for declaratory and injunctive relief is not actually styled as a recall. Rather, Plaintiffs want "[a]n order awarding declaratory relief and enjoining Defendant from continuing the unlawful, deceptive, fraudulent, harmful, and unfair business conduct and practices alleged herein." FAC, Dkt. # 21, at 35. As usual, Plaintiffs' request is vague and

[2] Given that Plaintiffs never purchased vehicles, the Court is somewhat baffled about what purely economic loss they possibly could have suffered. But this is somewhat unsurprising, as Plaintiffs' recurring theme in this case has been trying to fit the square peg of fraud into the round hole of personal injury.

ambiguous, but it does not seem to imply a recall. The Court will not read anything more into the FAC than Plaintiffs themselves put there.

2. Motion to Strike Class Allegations

a. Legal Standard

Under Federal Rule of Civil Procedure 12(f), the Court may strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter." Rule 23(d)(1)(D) also provides that a court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly."[3] Striking allegations under Rule 12(f) is primarily used "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1139 (N.D. Cal. 2010) (quoting *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983)). The standards for motions to strike resemble motions to dismiss—the Court must consider only the pleadings and matters subject to judicial notice, view the allegations in the light most favorable to the pleader, and grant leave to amend unless doing so would be futile. *Id*. at 1139-40.

The Ninth Circuit has recognized that it is usually better to "afford the litigants an opportunity to present evidence as to whether a class action [is] maintainable." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009). That said, a court may strike class allegations if the plaintiff "[can]not make a *prima facie* showing of Rule 23's prerequisites

[3] Ford also cites Rule 23(c)(1)(A), which provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." However, *Vinole v. Countrywide Home Loans, Inc.* distinguished between a defendant's preemptive certification motion under Rule 23(c)(1)(A) and a motion to strike. 571 F.3d 935, 941 (9th Cir. 2009) (distinguishing cases where the defendant had moved to strike). While the two motions are similar, Ford titled its motion as one to *strike* so the Court will consider it as such.

or that discovery measures [are] 'likely to produce persuasive information substantiating the class action allegations.'" *Id*. (quoting *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir.1977)). Indeed, courts in this circuit have cut off class actions when little-to-no discovery had taken place. *See, e.g.*, *Stearns*, 763 F. Supp. 2d at 1152; *Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 208 F.R.D. 625, 633, 634 (W.D. Wash. 2002). Here, Ford challenges Plaintiffs' on the basis of ascertainability and commonality/predominance.

b. Ascertainability

Though the Ninth Circuit disfavors the term "ascertainability," it is nonetheless useful for talking about definitional deficiencies in a class. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 n.4 (9th Cir. 2017). For example, a class definition may be overbroad if it includes individuals who sustained no injury and therefore lack standing to sue. *Stearns*, 763 F. Supp. 2d at 1152 (striking class allegations where definition included "all persons who have merely 'used' a Sleep Number bed in the past twenty-three years"). A class definition should also be based on objective criteria that allows the plaintiff to identify its members. *Bee, Denning, Inc. v. Capital All. Grp.*, 310 F.R.D. 614, 623 (S.D. Cal. 2015). On the other hand, a class definition is likely inadequate if it requires extensive fact-finding just to identify members. *See Martino v. Ecolab*, Inc., 2016 WL 614477, *10 n.133 (N.D. Cal. 2016). But this issue also overlaps with commonality/predominance, and the administrative feasibility of a class alone is not a prerequisite to certification. *Briseno*, 844 F.3d at 1128.

Ford argues that the current class definition is overbroad because it encompasses individuals who drove a 2011-2018 Ford Explorer but sustained no injury. The Court agrees. The FAC does not allege, and common sense does not suggest, that every single officer driving a 2011-2018 Ford Explorer has been injured by exhaust leakage. Indeed, the FAC does not even

contend that leakage is even a problem in all 2011-2018 Explorers. This means a substantial number of the proposed class members would lack standing to assert a claim, making the class definition not ascertainable.

c. Commonality/Predominance

To satisfy Rule 23(a)(2)'s "common question of law or fact" requirement, the plaintiffs' claims must "depend upon a common contention" that is "capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). For class actions seeking monetary damages,[4] Rule 23(a)(2)'s commonality requirement is subsumed under the Rule 23(b)(3)'s more stringent requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 609 (1997).

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Common questions are defined by the plaintiffs' ability to make a prima facie showing using the same evidence. *Id.* When considering whether common issues predominate, the court should begin with "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). In addition, "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized

[4] The FAC does not specify what type of class action Plaintiffs want to bring. Ford argues that the Court should construe the FAC as proposing a Rule 23(b)(3), rather than 23(b)(2), class action because Plaintiffs request compensatory damages that are more than "incidental" to their desired declaratory and injunctive relief. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (holding that only claims for monetary relief that is incidental to declaratory/injunctive relief can fit under Rule 23(b)(2)). Plaintiffs make no opposing arguments. The Court agrees with Ford and will consider this as a putative Rule 23(b)(3) class action.

questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016).

At the pleadings stage, courts have struck class allegations where an element to the plaintiff's claims inherently involves individualized inquiries. *See, e.g., Stearns*, 763 F. Supp. 2d at 1152-53 (individualized questions about causation and reliance made class action unfeasible); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (fraud claim would require individualized inquiries into reliance). Although they are not per se unviable, products liability cases present special difficulties for commonality and predominance. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Variation in causation is especially challenging in products liability class actions, and many courts have declined certification on this basis. *See, e.g., id.* at 1189 (finding lack of commonality due to causation and choice of law issues); *In re PPA*, 208 F.R.D. at 633, 634 (granting motion to strike class allegations in products liability case).

In *Amchem Products, Inc. v. Windsor*, the Supreme Court affirmed denial of certification in a class action based on asbestos exposure. 521 U.S. 591, 612 (1997). In doing so, the court explained how such a product-based case was different from mass torts involving a single accident because "class members . . . were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases." *Id.* at 609. Unlike mass torts cases where "the cause of injury was never in question," products liability claims inevitably produce a plethora of causal scenarios. *PPA*, 208 F.R.D. at 632.

Ford argues that Plaintiffs' claims demonstrate exactly this problem with causation. Ford points out that it will first be necessary to establish that the exhaust defect actually manifested in

each vehicle. The TSBs issued by Ford were "directed to specific operating conditions and potential manufacturing variances that may or may not be present in any specific vehicle." Motion to Strike, Dkt. # 22, at 7. Then, Ford asserts that some vehicles used by police are upfitted post-sale, requiring more analysis of whether the leak originated with Ford. In response, Plaintiffs insist that "all of these police vehicles leak exhaust emissions." Opposition, Dkt. # 31, at 11. This is in contrast to the FAC, which quotes both Ford's TSBs and the NHTSA as stating that the vehicles "may" have issues with exhaust leakage. FAC, Dkt. # 21, at 20. Plaintiffs simultaneously argue that there is a common question of whether the police vehicles suffer from a design flaw.

The Court agrees with Ford that individualized questions far outstrip common ones in this case. RCW 7.72.030(1) provides that "A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided." Even if Plaintiffs were able to establish that *all* 2011-2018 Ford Explorers used by police have the design flaw, there would still be the further issue of whether the flaw manifested to a meaningful degree in each vehicle and whether there could be alternate causes of the leak.

More problems arise from the breadth of Plaintiffs' class, which encompasses officers with utterly distinct types of injuries ranging from minor "foggy headed[ness]" to "heart attack like symptoms" to "chronic carbon monoxide poisoning." It is also conceivable that some class members could have gotten in crashes due to the effects of carbon monoxide, as some complainants to the NHTSA did. Such variety of injuries will introduce a variety of individualized causation issues: If the symptoms were minor, was exhaust clearly the cause? If

the class members had heart symptoms, do they have an underlying heart condition? If the class member got in a crash, were they or someone else at fault? In short, the FAC brings up too many individualized issues for certification to be plausible.

CONCLUSION

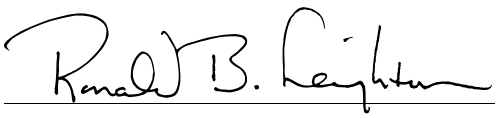
Ford's Motions are GRANTED. Plaintiffs' fraudulent concealment claim is DISMISSED with prejudice. The Court grants Plaintiffs leave to amend their WPLA claim to address the shortcoming discussed in this Order.

As for the class allegations, the Court has grave doubts about whether Plaintiffs' personal injury claims are amenable to the class action format. However, Plaintiffs FAC is currently so vague and poorly pled that the Court cannot say with certainty that a narrower, better-defined class action would be destined to fail. This is also the first time the Court has weighed in on Plaintiffs' pleadings. Accordingly, Plaintiffs have one chance to sharpen their class definition and allegations. Any amendments should narrow the class in such a way that causal variation is minimized. This may or may not be possible, but Plaintiffs should have an opportunity to try.

Plaintiffs have 30 days from the date of this Order to file a new complaint with an amended WPLA claim and amended class allegations. Failure to do so will result in this case being dismissed without further notice in 30 days.

IT IS SO ORDERED.

Dated this 27th day of April, 2020.



Ronald B. Leighton
United States District Judge